

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

YENG KONG MOUA,

Defendant and Appellant.

F074459

(Super. Ct. No. CRM032687)

**OPINION**

**THE COURT\***

APPEAL from a judgment of the Superior Court of Merced County. John D. Kiriara, Judge.

Victoria H. Stafford, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Michael P. Farrell, Assistant Attorney General, Julie A. Hokans and Jessica C. Leal, Deputy Attorneys General, for Plaintiff and Respondent.

-ooOoo-

---

\* Before Levy, Acting P.J., Peña, J. and Smith, J.

## **INTRODUCTION**

Appellant Yeng Kong Moua was convicted of multiple sex offenses. He contends there was insufficient evidence to support one of his convictions for violating Penal Code<sup>1</sup> section 220, subdivision (a)(1). Moua also contends the two 25- years-to-life sentences imposed pursuant to section 667.61 must be reversed because the accusatory pleading did not contain any section 667.61 allegations. We affirm the convictions, but remand for resentencing.

## **FACTUAL AND PROCEDURAL SUMMARY**

Moua's challenge to the terms of 25 years to life for the count 2 and 4 convictions is conceded by the People. The only contested issue is whether the evidence is sufficient to uphold the count 5 conviction.

The third amended information alleged multiple counts involving seven separate victims and covering a time span from April 2011 to March 2014. The third amended information was filed on April 12, 2016, charging Moua in counts 1, 5, and 9 with violating section 220, subdivision (a)(1), assault with intent to commit rape, sodomy, oral copulation, or sexual penetration; in count 2 with sexual penetration in violation of section 289, subdivision (a)(1)(A); in counts 3 and 6 with assault with intent to commit rape of a person under 18 years of age, in violation of section 220, subdivision (a)(2); in count 4 with sexual penetration of a minor over 14 years of age, in violation of section 289, subdivision (a)(1)(C); in counts 7 and 8 with indecent exposure, in violation of section 314(1); and in count 10 with making a criminal threat, in violation of section 422, subdivision (a).

On April 22, 2016, the jury found Moua guilty on all counts. At the September 20, 2016, sentencing hearing, the trial court imposed indeterminate terms of

---

<sup>1</sup> References to code sections are to the Penal Code unless otherwise specified.

25 years to life, pursuant to section 667.61, subdivision (m), in counts 2 and 4. A total determinate term of 26 years 8 months was imposed for the other counts.

### ***Count 5***

Carrie K. is the victim of the count 5 offense. Around 6:15 a.m. on March 23, 2012, Carrie was on Rambler Road in Merced on her usual morning jog through her neighborhood when she noticed a car passing her, then making a U-turn. After making a U-turn, the car parked. Carrie reached the end of the street and turned around to find someone five to ten feet in front of her. The person was a small Asian male, thin, and “pretty young.”

Carrie said, “good morning” and continued to jog. The man followed her. When the man caught up with her, he asked if she was exercising; he had an Asian accent. Carrie responded affirmatively and asked him if he was out for a walk. After this interaction, the man “[v]ery suddenly ... reached down and grabbed me.” Carrie testified the man “grabbed the front of my crotch” with one hand, and “with the other hand he grabbed my rear end.”

Carrie was angry and “shoved him as hard as I could with my elbow,” and yelled, “[g]et off me.” Carrie sprinted home, told her husband, and later that morning called the police. Carrie was not able to give a good description of her attacker, or his car; it had been dark outside at the time of the incident.

About a year after the incident, a crime alert was received by Carrie’s husband. He emailed the crime alert to Carrie with the comment, “Hey. This is the same guy.” Carrie called and followed up with the police department. She was shown a photo lineup; however, she was unable to identify the perpetrator.

### ***Other Evidence***

On April 7, 2011, Melinda B., the victim in the count 6 offense and then a minor, was walking home around 8:30 p.m. When she arrived at an intersection, she saw

someone sitting inside a Honda that was “gold-silver” in color. The Honda drove past her, then parked. The man in the car, identified at trial by Melinda as Moua, rolled down his window and started talking to her. He spoke with a Hmong accent. Melinda had her phone out and typed the first few digits of his license plate, 5PCL.

Melinda turned and walked away; Moua got out of the car and walked toward her. Moua asked if she was scared, grabbed her from behind, and wrapped both his arms around her. Moua used his hands to grab Melinda’s breasts and “vaginal part.” Melinda screamed for help; Moua was trying to pull her towards his car. Another car approached and Moua released her; Melinda ran home. Melinda described the man to police as about five feet five inches tall; around 180 pounds; and in his “mid 20’s.”

Jennifer S., the victim in counts 9 and 10, was jogging on Dunn Road in Merced the morning of January 29, 2013, around 6:00 a.m. As Jennifer jogged toward the park on Dunn Road, she noticed a man by a play structure in the park smoking a cigarette. The man began jogging beside her. The man was Asian, about 130 pounds, and “littler” than Jennifer. The man kept saying, “I talk to you. I talk to you.” The man spoke in “very broken English” and had a “[v]ery, very thick accent.”

The man grabbed Jennifer’s arm, “very violently and said, ‘I fuck you.’ ” She pulled her arm away and screamed, “Don’t.” Jennifer started screaming and running toward her brother-in-law’s home, three blocks away. As she was running away, the man stated several times, “I going to kill you.” The man was running after her, but Jennifer outran him. The police were called when she arrived at her brother-in-law’s house.

Although Jennifer previously had been unable to identify Moua in a photo lineup, she identified him at trial as her attacker.

Leticia C., the victim in counts 3 and 4, was a minor who was accosted on August 27, 2013, around 8:30 a.m. A man smoking a cigarette attempted to speak with her; Leticia identified the man as Moua. Leticia kept walking. The man caught up to her

and attacked her. Moua managed to pull Leticia to the ground and put his fingers inside her vagina.

M.S., the victim in count 8, was on her morning walk in Merced on September 30, 2013, around 11:00 a.m., when a car pulled up beside her. “[T]here was a male in the car. He already had his pants down, and he was masturbating in the car.” The man in the car was “a small-in-stature Hmong man in his early 20’s.” M. took out her phone to take a picture of the car, but the car sped away. She was able to remember the first four digits of the license plate. M. had seen the same car about two weeks earlier during her walk.

At trial, M. identified Moua as the man in the car. Previously, she had been unable to identify Moua from a photo lineup.

April P., the victim of the count 7 offense, was out walking on February 6, 2014, around 1:45 p.m. She saw a car following her; the car then “pulled up next” to her. The man in the car started talking to her, but April could not understand his Asian accent. At trial, April identified the man as Moua. When April was about a foot away from the car, she understood Moua to say to her, “Let me fuck you.” Moua then stated, “Hey. Look at this.” April glanced toward him and it appeared that Moua was “fondling himself.” April grabbed her phone, began walking away, and dialed 911.

Angelina S., the victim in counts 1 and 2, was accosted on March 13, 2014. Angelina had been a passenger in a friend’s car when it ran out of gas; she began walking home early in the morning. A man she identified as Moua left his car, “[came] right next” to her, and spoke to her. He spoke with an Asian accent. Moua pushed Angelina from behind and she fell onto the grass. Moua put his fingers inside her vagina, over her clothes.

Jennifer and Leticia had noted that their attacker smoked; the cigarette butts found in both locations had matching male DNA. The DNA profile from the cigarettes was compared to DNA obtained from Moua. It was the same.

A Honda Accord outside Moua's residence at the time a search warrant was executed had the same first four digits of the license plate as had been reported by M..

Moua testified in his own defense. He did not know how to explain the DNA from the cigarettes matching his DNA. He testified he had never seen the women who testified against him before the trial began.

### **DISCUSSION**

Moua contends the evidence is insufficient to sustain the count 5 conviction. He also contends the trial court erred at sentencing in imposing terms of 25 years to life on counts 2 and 4.

#### **I. Sufficient Evidence Supports Count 5**

Moua contends insufficient evidence supports his conviction for assaulting Carrie with the intent to commit a sexual offense. Specifically, he contends there is no evidence he is the perpetrator of the assault on Carrie and no evidence the assailant intended to commit a sexual offense. The count 5 offense is a violation of section 220, subdivision (a)(1).

##### **A. *Standard of Review***

In reviewing the sufficiency of the evidence, “we review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.” (*People v. Cravens* (2012) 53 Cal.4th 500, 507.) “We must presume in support of the judgment the existence of every fact that the trier of fact could reasonably deduce from the evidence.” (*People v. Medina* (2009), 46 Cal.4th 913, 919.) “The conviction shall stand ‘unless it appears “that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].” ’ ” (*Cravens*, at p. 508.) The standard of review is

the same in cases in which a conviction is based primarily on circumstantial evidence. (*People v. Clark* (2016) 63 Cal.4th 522, 625.)

**B. Analysis**

With respect to Moua's claim that there is no evidence he was Carrie's assailant, he is incorrect. "The identification of the perpetrator of an offense may be established entirely by [circumstantial] evidence." (*People v. Barnum* (1957) 147 Cal.App.2d 803, 805.) Carrie's description of her attacker matched Moua's appearance: Asian, small, thin, "pretty young," shorter than her, with an Asian accent. At the time of the attack, Moua was a 22-year-old, short, Asian male who spoke English with an accent. Carrie's description of the car driven by her attacker as a "brownish" sedan was consistent with the vehicle parked at Moua's residence, a "pewter/gold" Honda sedan.

Carrie's description of her attacker matched that of the other victims. Further, the attack on Carrie occurred in the same general area as the attacks on Moua's other victims, and relatively close in proximity to Moua's residence. The pattern of each attack had similarities. In each instance, Moua was in a vehicle before approaching the victims; the victims were all women or girls walking or jogging alone on the street; Moua attacked the victim or masturbated; the incidents were of short duration; and Moua quickly fled the scene.

Where, as here, multiple crimes share a distinctive modus operandi, an inference arises that the same person committed the crimes. (*People v. Maury* (2003) 30 Cal.4th 342, 392-393.) When the multiple victims provide substantially identical descriptions of their attacker, as did the victims here, and those descriptions match Moua's appearance, there is additional circumstantial evidence that Moua was the perpetrator of all the attacks, including the one on Carrie. "The sufficiency of the evidence of identification is generally a question for the trier of facts." (*People v. Wiest* (1962) 205 Cal.App.2d 43,

45.) “In order to sustain a conviction the identification of the defendant need not be positive.” (*Ibid.*)

The circumstantial evidence supporting Moua’s guilt is further bolstered by the DNA evidence linking Moua to two of the attacks substantially similar to the attack on Carrie. Taken together, the circumstantial evidence is sufficient for a reasonable trier of fact to find that Moua was the perpetrator of the attack on Carrie. (*People v. Wiest, supra*, 205 Cal.App.2d at p. 45.)

Moua also contends there is no evidence he intended to perpetrate a sexual assault on Carrie. Again, he is incorrect. “ ‘ “The essential element of [assault with intent to commit rape] is the intent to commit the act against the will of the complainant.” ’ ” (*People v. Maury, supra*, 30 Cal.4th at pp. 399-400.) “ ‘ “[I]f there is evidence of the former intent and acts attendant to the execution of that intent, the abandonment of that intent before consummation of the act will not erase the felonious nature of the assault.” ’ ” (*Id.* at p. 400.)

Here, Carrie testified Moua “grabbed the front of my crotch” with one hand, and “with the other hand he grabbed my rear end.” The intent to commit a sexual assault is very clear. Moua grabbed Carrie’s crotch, or genital area, and her buttocks, which is a very sexually explicit action. Moreover, prior to the attack on Carrie, Moua attacked several other females in a manner substantially similar to his attack on Carrie, where he explicitly indicated his sexual intent by words or deeds.

There is no evidence Carrie was carrying any purse, money, or other item of value that Moua may have been after when he grabbed Carrie and he made no demand for any such items. In the case of *People v. Dobson* (1970) 12 Cal.App.3d 1177, the assailant pushed the victim down onto an automobile seat, pulled the victim up to him, then pushed her back onto the seat. The assailant then began to choke the victim into unconsciousness. There was no attempt to steal from the victim. (*Id.* at pp. 1180-1181.)



The appellate court concluded there was sufficient evidence from which a reasonable jury could find the purpose of the assault was an attempt to rape. (*Id.* at p. 1181.)

The jury requested, and was read, the transcript of Carrie’s testimony. This indicates the jury carefully considered the count 5 charge and the evidence supporting that charge. Presuming “in support of the judgment the existence of every fact that the trier of fact could reasonably deduce from the evidence”, we conclude there is substantial evidence supporting the count 5 conviction. (*People v. Medina, supra*, 46 Cal.4th at p. 919.)

## **II. Sentencing Error**

The trial court imposed terms of 25 years to life for the count 2 and count 4 convictions pursuant to section 667.61, subdivision (m). Moua contends imposition of these terms was error. The People concede the issue. We agree.

Section 667.61, subdivision (m), provides that for certain felony sex offenses committed under one or more of the circumstances enumerated in the code section against a minor 14 years of age or older, the punishment is a term of 25 years to life in prison. Section 667.61 is known as the “one strike” law because it imposes life imprisonment as the punishment for certain sex offenses committed under specified circumstances, even if the defendant has no prior record. (*People v. Estrada* (1997) 57 Cal.App.4th 1270, 1274.)

Section 667.61, subdivision (o) provides that the penalties enumerated in this code section “shall apply only if the existence of any circumstance specified ... is alleged in the accusatory pleading pursuant to this section, and is either admitted by the defendant in open court or found to be true by the trier of fact.” In *People v. Mancebo* (2002) 27 Cal.4th 735, the California Supreme Court held the one strike allegations **must** be alleged in the accusatory pleading. (*Id.* at p. 752; accord, *People v. Perez* (2015) 240 Cal.App.4th 1218, 1223.)

Although Moua may have been eligible for sentencing pursuant to section 667.61 on some counts, none of the charging documents, including the complaint, information, first amended information, second amended information, and third amended information, referenced any allegations under section 667.61.

The People having failed to allege section 667.61 in any accusatory pleading, the trial court erred in imposing a term of imprisonment on counts 2 and 4 pursuant to section 667.61, subdivision (m).<sup>2</sup>

### **DISPOSITION**

The District Attorney's request to file an amicus brief is denied. The convictions are affirmed. The sentence is vacated, and the matter remanded to the trial court for resentencing.

---

<sup>2</sup> The District Attorney filed a request to file an amicus brief on the sentencing issue. The request was untimely. Moreover, it would not affect the outcome of this issue. The District Attorney posits that Moua should have been on notice that section 667.61 would be applied, despite the lack of any allegation in the accusatory pleading, because of the number of peremptory challenges afforded the parties. We reject this argument. The California Supreme Court is clear that section 667.61 can apply only when it has been pled in the accusatory pleading and proven at trial or by admission of the defendant. (*People v. Mancebo*, *supra*, 27 Cal.4th at p. 752.)